UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

HENKEL CORPORATION
Employer

and **Case 32-RC-5560**

MACHINISTS AND AEROSPACE WORKERS
LOCAL LODGE 1584, DISTRICT LODGE 190,
INTERNATIONAL ASSOCIATION OF MACHINISTS
& AEROSPACE WORKERS, AFL-CIO
Petitioner

David A. Rosenfeld, Esq., Alameda, California,
for the Petitioner.
Adam C. Abrahms, Esq., of Los Angeles, California
for the Employer.

DECISION AND RECOMMENDATIONS
ON OBJECTIONS

Procedural History

In early 2008, Machinists and Aerospace Workers Local Lodge 1584, District Lodge 190, International Association of Machinists & Aerospace Workers, AFL-CIO (the Petitioner)[1] conducted an organizing campaign among employees of Henkel Corporation (the Employer),[2] a manufacturer of aerospace adhesives, at its facility in Bay Point, California. On April 10, 2008,[3] Petitioner filed a petition seeking to represent certain employees of the Employer for purposes of collective bargaining. The parties' Stipulated Election Agreement set forth the following unit of employees for voting in the election:

> All full-time and regular part-time production employees, warehouse employees, quality control employees, and maintenance employees employed by the Employer at its Bay Point, California facility; excluding all other employees, office clerical employees, research and development employees, temporary agency employees, guards, and supervisors as defined in the Act.

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[1] The Petitioner is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. The parties agree, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act (the Act), 29 U.S.C. §152(5).

[2] The Employer, a Delaware corporation, maintains a facility in Bay Point, California, where it manufactures and supplies industrial adhesives. During the past twelve months, the Employer has directly purchased and received products valued in excess of $50,000 from suppliers located outside the State of California. The parties agree and I find that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act, 29 U.S.C. §152 (2), (6), and (7).

[3] All dates are in 2008 unless otherwise referenced.

The parties engaged in extensive campaigning for their respective positions. The Petitioner and the Employer, combined, issued at least 87 written communications to employees during the six-week period leading up to the election. Employer communications were handed out on the work floor during working time and posted on Employer bulletin boards. Union literature was distributed generally during lunch and break time. Union literature was not authorized to be placed on bulletin boards. Petitioner communicated extensively with unit employees utilizing e-mail, telephone, text messages, and faxed messages.

There is no evidence that any employee was disciplined for election-related conduct during the six-week "critical period"[4] from April 10 (the date the petition was filed) to May 22 (the date the election was held).

Pursuant to the parties' Stipulated Election Agreement, a secret ballot election was conducted by the NLRB on May 22. The Tally of Ballots showed the following results:

Approximate number of eligible voters	154
Number of void ballots	0
Number of votes cast for Petitioner	67
Number of votes against participating labor organization	80
Number of valid votes counted	147
Number of challenged ballots	4
Valid votes counted plus challenged ballots	151

Although the Petitioner did not receive a majority of the valid votes counted, Petitioner seeks a rerun election because it believes that Employer conduct prevented a fair election. To that end, on May 29, the Petitioner filed timely objections to the election. The Regional Director for Region 32 of the NLRB conducted an investigation of the objections and recommended that certain objections be overruled and that others be set for hearing. [5]

The hearing was held in Oakland, California on June 24, July 2 and 3. All parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions. On the entire record, including my observation of the demeanor of the witnesses,[6] and after considering the briefs filed by Petitioner and Employer, I make the following findings of fact and recommendations.

Objection 2 -- "The employer maintained unlawful rules which interfered with the right of the employees to engage in Section 7 protected activity"

The Employment Policy Handbook sets forth "many . . . policies and practices" for Henkel Technologies North America.[7] According to Branwyn Fearn, human resources manager, the Handbook applies to Henkel Technologies business sector. The Bay Point facility is part of

[4] The "critical period" begins on the date the petition is filed and ends on the date of the election. *Ideal Electric Mfg. Co.,* 134 NLRB 1275, 1278 (1961).

[5] The Regional Director's Report, issued June 13, recommended that Objections 1, 5, 6, 9, 11, and 13 be overruled. However, upon reconsideration, objection 5 was also set for hearing in addition to objections 2, 3, 4, 7, 10, and 12. Ultimately, Petitioner withdrew objection 5.

[6] Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

[7] Handbook at p. 3.

this business sector and there are other such facilities located throughout the United States and in other countries. Three United States facilities in this business sector are unionized. The parties stipulated that the Employment Policy Handbook is a company document provided to some, but not all, of the employees.

Fearn testified that she routinely investigates violations of the Employment Policy Handbook and participates in decisions to discipline Bay Point plant employees who have violated Handbook rules. The Handbook is available in the Bay Point plant human resources office in addition to copies that are provided to some but not all Bay Point employees.

Although the Employer argues that there is no evidence that the Handbook applies to Bay Point employees, I find in light of the above evidence that the Handbook sets forth rules of conduct and disciplinary policies which are applicable to employees at the Bay Point facility. I note that the parties stipulated that the Handbook is furnished to some but not all employees and is available in Human Resources. I also note the parties' stipulation that no employee was disciplined pursuant to the Handbook rules during the critical period.[8]

Standard of Review

In general, if a rule explicitly restricts Section 7 activity, the rule is invalid. *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004). If there is no express prohibition of Section 7 activity, a rule may nevertheless be objectionable if employees would reasonably construe the language to prohibit Section 7 activity or the rule was promulgated in response to union activity or the rule was applied to restrict Section 7 activity. *Longs Drug Stores California, Inc.,* 347 NLRB No. 45, slip opinion at 1-2 (2006); *Lutheran Heritage, supra,* at 647. Finally, "in determining whether a challenged rule is unlawful, the Board must . . . give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage, supra,* at 646.

Pursuant to the above standard, each of the challenged rules will be considered seriatim. The complete text of each rule is set forth in Appendix A. At this juncture, I will consider only whether Petitioner has satisfied its burden of proving objectionable conduct. At the conclusion of the decision, I will consider whether a second election is required.

The Handbook caption which reads "Compensation; Non-union, Non-exempt Employees," and thereafter describes a base salary package, merit increases, and variable pay.[9]

The actual discussion regarding base salary package, merit increases, and variable pay does not repeat the caption reference to "non-union, non-exempt employees." The portion of the compensation rule entitled "non-union, non-exempt employees" discusses a bi-weekly payment schedule and sets forth factors utilized for determining wages such as local salary surveys, identification of skills, experience, and competencies. Merit increases and variable pay are also discussed. The policy does not set forth any specific wages.

Petitioner argues that employees could reasonably believe that if the union won the election, unit employees would lose their "non-union" status under the Handbook, and thus would also lose all compensation under the policy. On the other hand, the Employer notes that

[8] The parties stipulated that no employee was disciplined for violations of any of these rules within the six months preceding the hearing; i.e., roughly from January through June.

[9] Handbook at p. 7. The entire policy is set forth in Appendix A.

the Handbook caption was intended to exempt application to facilities where a collective-bargaining agreement covered employees' wages. Moreover, the Employer argues, throughout the election campaign, employees were repeatedly told that if the Union won, collective-bargaining negotiations could result in wages which were more, less, or exactly the same as current wages. Finally, the Employer contends that Petitioner failed to show that any employee was impacted by the Handbook caption or had even read the Handbook caption.

Although the term "non-union" is utilized in this caption, it is worthy of note that three of the Employer's United States facilities are unionized. Reading this rule in that context, it is obvious that the Handbook caption was meant to exempt unionized facilities from this section's coverage because wage structures at those facilities would be determined by a collective-bargaining agreement. Moreover, unit employees were aware of at least one of the unionized facilities because during the critical period, a collective-bargaining agreement at the Employer's Buffalo facility was discussed by unit employees.

I find that the caption does not constitute a basis for objectionable conduct. First, when read in context, the caption does not explicitly restrict union activity. Moreover, I find that the caption would not be reasonably read to interfere with union activity. Further, as the Handbook was in existence long before the critical period, this caption was not promulgated in response to the Petitioner's campaign. Finally, there is no evidence that the caption has been applied to restrict union activity. Accordingly, I recommend that Objection 2 as it related to the Handbook caption "non-union, non-exempt" employees be overruled.

Employment Verification procedures which state that "Managers, supervisors, and all employees should" refer all inquiries about past or present employees to the Human Resources Department.[10] This rule further states, "[The Employer] considers any information regarding past or present employees as private and confidential.":

The purpose of the employment verification policy is "to establish and define the policy and procedures regarding release of information regarding past or present employees requested by outside sources (e.g., prospective employers)." Information regarding past or present employees is considered private and confidential. All inquiries are to be directed to Human Resources. The policy further provides that the Employer will not take a position on potential continued employment or re-hire of any individual.

The Petitioner argues that this policy is overbroad because "'any information' regarding [past or present] employees may reasonably be understood to include wages, benefits and other terms and conditions of employment." Thus, Petitioner's argument is that employees would reasonably construe this language to prohibit discussions with the Union regarding their wages, hours, and terms and conditions of employment.

The rule does not explicitly prohibit Section 7 activity. See, e.g., *Waco, Inc.,* 273 NLRB 746, 748 (1984)(rule explicitly prohibiting employees from discussing wages with each other constitutes a clear restraint on Section 7 activity). Further, the Employer's employment verification policy was not promulgated in response to employee union activity. Moreover, there is no evidence that any employee has been disciplined for violation of this policy.

Nevertheless, I find that employees would reasonably read this rule to restrict their Section 7 right to discuss wages, hours, and other terms and conditions of employment with

[10] Handbook at pp. 10-11. The entire policy is set forth in Appendix A.

outside sources such as a union. Such communication would, of course, constitute a key element in any organizing campaign. In *Fruend Baking Co.,* 336 NLRB 847 (2001), the Board found that a similar rule,[11] although unenforced and in existence prior to the critical period, constituted objectionable conduct warranting a second election. Similarly, in *The NLS Group,* 352 NLRB No. 89, slip opinion at 2 (2008), the Board held, in an unfair labor practice context, that a rule which stated that terms of employment, including compensation, are confidential and may not be disclosed to other parties, was overbroad. The Board found that employees would reasonably understand the rule as prohibiting discussion about compensation with union representatives.

Mindful of the Board's admonition in *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 340 (D.C. Cir. 1999): to "give the rule a reasonable reading . . . and refrain from reading particular phrases in isolation," I am nevertheless persuaded that this policy would be reasonably understood by employees to preclude conversations with the Union regarding their wages, hours, and terms and conditions of employment. It is perhaps tempting to conclude that, when read in context, this policy would be understood to apply only to requests from prospective employers who are considering hiring past or present employees. However, to be perfectly literal, that is not what the policy states. Rather, the policy states, "The purpose of this policy is to establish and define the policy and procedures regarding release of information regarding past or present employees requested by outside sources (e.g., prospective employers)." Thus, literally, prospective employers are merely an example and a union would also certainly qualify as an outside source. Thus, I recommend that Objection 2 be sustained as to the Employment Verification Handbook policy.

Privacy of Employee Record:[12]

The Handbook contains a policy to ensure privacy of employee records. The policy sets forth procedures for release of information contained in employee files and procedures for employee access to their personnel file. Petitioner targets two components of this rule. First, the policy states, "All records pertaining to the employment of an individual are considered confidential." Second, "Unauthorized removal of documents from the file will be considered theft and may be grounds for immediate discharge."

This rule, given a reasonable contextual reading,[13] sets forth procedures for access to personnel files. The rule applies only to the personnel records mentioned throughout the rule. It is clear that the rule is intended to protect only those personnel records which are exclusively the property of the Employer. The rule does not attempt to limit the information within the records but, rather, only the records themselves. The rule does not limit employees' ability to discuss with one another and with third parties, information pertaining to their employment.

I find that this rule does not explicitly prohibit Section 7 activity. Further, I find that employees would not construe the rule to prohibit Section 7 activity. Finally, I note that the rule has been in existence since at least 2006 and that no employee has been disciplined during 2008 for any violation of this policy.

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[11] The rule, entitled "Security: Confidential Information," stated that all information obtained by employees, including information in the company's policies manual (which contained wages, hours, and terms and conditions of employment), was "proprietary" and, if disclosed, employees would be subject to discipline and possible legal recourse.

[12] Handbook at pp. 35-36. The entire policy is set forth in Appendix A.

[13] *Lutheran Heritage Village-Livonia, supra,* 343 NLRB at 646; *Lafayette Park Hotel, supra,* 326 NLRB at 825.

Complaint Resolution Policy:[14]

At the hearing, Petitioner announced that, in addition to other policies set forth in Objection 2, it also considered the complaint resolution policy to be objectionable conduct. Petitioner did not pursue this statement further and has not briefed this topic. In light of this, I recommend that any allegation regarding the complaint resolution policy be overruled.

Solicitation and Distribution of Literature[15]

Respondent's Handbook provides in part:

> To avoid disruptions and possible discord among employees, Henkel prohibits employees from soliciting other employees or distributing literature concerning non-work-related causes or activities on Henkel property.
>
> To avoid disruptions and possible discord among employees, Henkel prohibits employees from soliciting other employees during the working time of either employees wishing to solicit or the working time of employees being solicited.
>
> Similarly, Henkel prohibits employees from distributing literature during employee's working time and strictly prohibits distribution of literature by employees in work areas at all times.

Further, the Handbook provides under "Corrective Action / Termination" various "examples of behavior or actions that may result in corrective action up to and including immediate termination." Included in the examples is "Distribution or posting of material unrelated to Company business . . . ."[16]

A rule which prohibits solicitation or distribution anywhere on company property entirely deprives employees of their right to communicate in the workplace on their own time, *Republic Aviation Corp. NLRB,* 324 U.S. 793, 801 fn. 6 (1945), and is presumptively invalid *Id.* at 803 fn. 10*; Laidlaw Transit, Inc.,* 315 NLRRB 79, 82 (1994); *Our Way,* 268 NLRB 394 (1983). Thus, the first paragraph of Respondent's rule prohibiting solicitation and distribution anywhere on its property is presumptively unlawful. The second and third paragraphs, although contradictory of the first, do nothing to cure the defects of the first paragraph. I recommend that Petitioner's Objection 2 as it relates to the solicitation rule be sustained.

Objection 3: "The Employer refused to allow employees access to bulletin boards in a discriminatory fashion."

Facts

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[14] Handbook at pp. 37-38. The entire policy is set forth in Appendix A.

[15] Handbook at p. 43. The entire policy is set forth in Appendix A.

[16] The Corrective Action / Termination section is at Handbook pages 35-36 and is reprinted in Appendix A.

Prior to filing of the election petition, most of the Employer's bulletin boards were covered with glass and locked.[17] However, an open bulletin board is located outside the lunch room in a walkway area delineated by a chain link fence. The "walkway bulletin board" is thus viewed through the chain link barrier but there is no glass over the bulletin board and it is not locked in any way. It is this walkway bulletin board upon which the Petitioner's Objection 3 is principally based.

The Handbook contains a corrective action provision[18] for posting of material unrelated to the Employer's business anywhere in the facility. The policy sets forth a progressive disciplinary system including examples of various behaviors or action that could result in corrective action up to and including termination. One such example is: "Distribution or posting of material unrelated to Company's business. . . ." Although no employees were disciplined for violation of this corrective action procedure, the rule was nevertheless in effect during the critical period.

According to former plant manager Thomas Morey,[19] and current production manager Nicola Maher, the practice since 2006 regarding bulletin board postings was that employees needed approval from human resources to post anything on a company bulletin board. The record reflects that both before and during the critical period, the Employer allowed only official company materials, or literature regarding company-supported charitable drives (a Red Cross blood drive), Employee Activity Committee[20] sponsored literature (a golf tournament, a softball team, company gatherings, picnic barbecues, etc.), and company matching funds literature (a walk-a-thon to aid the Leukemia/Lymphoma Society).

Managers and supervisors removed literature that does not conform to the company policy. For instance, Maher testified that she routinely removed items from bulletin boards and walls including cartoons and notices of items for sale. In April, Maher recalled removing one employee anti-Union leaflet which utilized profanity. She told employees in the area that "they couldn't do this." Maher also recalled pro-Union literature being posted on bulletin boards and walls in the plant. She did not investigate these incidents or discipline any employee due to these postings. However, she removed all such postings. Maher admitted that during the Union campaign, she paid more attention to Union literature and focused on removal of unauthorized literature from the plant.

Despite the enforcement of the bulletin board policy, employees observed unauthorized materials posted on the walkway bulletin board. For instance, according to films department employee Craig Lloyd, a blood drive for a local child was posted in approximately February. After the election, Lloyd noticed an advertisement for a car show in Pinole. Lloyd also remembered "something about a Jeep" posted during the critical period. Lloyd testified these

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[17] The glass was added in early 2008 as part of a plant beautification program. Enclosure of the bulletin boards in glass, which occurred outside the critical period, is not alleged as objectionable conduct.

[18] This is the same corrective action procedure, found at Handbook pp. 35-36, discussed with regard to the Solicitation and Distribution rule, above. The entire Handbook section is reprinted in Appendix A.

[19] Although Morey left his position as plant manager during the fall of 2007, he testified that he retained familiarity with the practice due to his continued, sporadic presence at the plant during 2008 in his new position as special projects manager.

[20] The Employee Activity Committee is composed of supervisors and employees. It sponsors golf tournaments, a softball team, company gatherings, picnics, barbecues and various other company related activities. It is an official Employer committee funded by the Employer. The money is used to purchase gifts and sponsor events. For instance, on April 12, the EAC sponsored a golf tournament and furnished trophies, golf balls, and extra money needed to supplement the tournament. Employees also pay to participate in the golf tournament.

items were posted, "Probably until they sold, you know, a week or so." Unit employee Dan White recalled seeing postings regarding vehicles for sale, rims for sale, and comic strips, sometimes with a person's name inserted on the comic. These postings were on the walkway bulletin board and remained posted over a period of time.

Unit employee Willard Morris testified that he has observed the following postings on the walkway bulletin board: party invitations, a car show (April and May), a big screen television (two weeks by Morris), and candied apples for sale (one week in February). Morris also observed cartoons posted on the walkway bulletin board. Finally, Morris recalled items for sale: cars, vehicles, stereo equipment, and rims. Unit employees testified, however, that they never observed any posted solicitations from religious groups or political organizations. White agreed he never saw a commercial solicitation from, for example, Amway or some similar entity.

On April 20, Petitioner filed an unfair labor practice charge in Case 32-CA-23878 alleging that the Employer violated Section 8(a)(1) by refusing to allow employees to post information about the Union organizing effort. By letter of April 24, Petitioner accused the Employer of an unlawful bulletin board policy as it related to postings by the Union. Both the unfair labor practice charge and the letter were part of the extensive communications between the Union and unit employees.

I credit all of the above bulletin board testimony. There are no actual conflicts in the testimony. Accordingly, I find that the Employer maintained a policy requiring human resources authorization before any items could be posted on its bulletin boards. Authorization was routinely given for official company documents, Employer-sponsored events such as the Red Cross blood drives, Employee Activities Committee events such as the golf tournament, and matching fund items such as the thank you letter posted for the Leukemia, Lymphoma Society Walk-a-thon. Additionally, I find that the walkway bulletin board was utilized by employees to post items for sale and cartoons. These items remained on this bulletin board for about a week. There is no specific evidence that management or supervisors were aware of all of these personal postings. However, there is evidence that managers or supervisors removed the personal sale items and cartoons when they saw them.

Arguments

Citing *Honeywell, Inc.,* 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983), Petitioner argues that the Employer's prohibition of walkway bulletin board use for Union literature constitutes objectionable conduct because the Employer discriminatorily prohibited Union literature while allowing postings of nonwork-related matters. Petitioner further asserts dissemination in that all employees were aware of Petitioner's discriminatory bulletin board policy due to extensive communications from the Union to unit employees.

The Employer argues that its bulletin board policy was not discriminatory, noting that both before and during the critical period, only official company documents or documents regarding company-approved charitable endeavors or Employee Activities Committee events were allowed on the bulletin boards. Relying on *Timken Co.,* 331 NLRB 744 (2000), enfd. mem 29 Fed. Appx. 266 (6th Cir. 2002), and *Miller Brewing Co.,* 311 NLRB 1364 (1993), the Employer asserts that simply because some unauthorized postings occurred on an occasional basis it does not necessarily follow that the Employer failed to enforce the posting policy or discriminatorily applied the policy. Finally, the Employer avers that Petitioner failed to show that any alleged discriminatory action interfered with employee free choice noting that Petitioner had virtually daily communication with unit employees.

Analysis

Although not raised as an objection, I note preliminarily that the Employer's bulletin board rule is facially valid. Bulletin boards are company property and employees have no statutory right to post on them. *Eaton Techs*, 322 NLRB 848, 852 (1997) ("no statutory right of employees or a union to use an employer's bulletin board")**;** *Container Corp*., 244 NLRB 318 fn. 2 (1979), enfd. 649 F.2d 1213 (6th Cir. 1981) (per curiam); see also, *Champion International Corp.*, 303 NLRB 102, 109 (1991) (employer has a "basic right to regulate and restrict employee use of company property").

Petitioner's argument is that the Employer discriminated in enforcement of the bulletin board policy. I find insufficient evidence to sustain this objection. Rather, the record supports a finding that both before and during the critical period, the Employer consistently took steps to enforce its policy. For instance, production manager Maher removed items from bulletin boards and walls, including one anti-union posting and numerous Union postings. Both before and during the critical period, other managers and supervisors routinely removed non-approved items from the bulletin boards and walls. Although during the critical period, employees saw prohibited personal advertisements on the hallway bulletin board, there is no evidence that supervisors or managers saw these personal advertisements and thereafter allowed them to remain posted. Employees also saw cartoons on various bulletin boards including the hallway bulletin board. Managers and supervisors removed these items when they saw them.

Unauthorized postings are inevitable. The fact that not every unauthorized posting was removed immediately is thus not determinative of discriminatory enforcement. *Timken Co., supra,* 331 NLRB at 754-755 (occasional posting of unauthorized materials in large plant does not support finding that company tolerated free use of bulletins boards); *Miller Brewing Co., supra,* 311 NLRB at 1364 fn. 2 (company removed postings as it became aware of them), both relied upon by the Employer. Petitioner's evidence regarding the bulletin board enforcement is insufficient to prove discriminatory enforcement. See, e.g., *Publix Super Markets, Inc.,* 347 NLRB No. 124 (2006)(daily observation of personal for sale items on bulletin board contrasted with removal of pro-union material); *Bon Harbor Nursing & Rehabilitation Center,* 348 NLRB No. 70, slip opinion at 1, fn. 4 (2006)(failure to enforce handbook rule regarding prior authorization until advent of union organizing drive, and then enforcing rule only regarding union materials, constitutes restraining and coercion of employees); see also, *Heartland of Lansing Nursing Home*, 307 NLRB 152, 160 (1992); *Holly Farms Corp.*, 311 NLRB 273, 274 (1993);[21] *Bon Marche*, 308 NLRB 184, 185 (1992).

Objection 4: "The employer promised and then reneged on its promise to allow employees to post information on bulletin boards supporting the union and to provide a bulletin board."

No evidence was presented in support of this objection. I recommend that it be overruled.

[21] The enforcement of the employer's handbook rule was not at issue in further litigation: *Holly Farms Corp. v. NLRB,* 48 F.3d 963 (4th Cir. 1995)(enforcing the Board's Order); 517 U.S. 392 (1996)(affirming the circuit court's decision).

Objection 7 -- "The employer maintained an unlawful internet policy which is discriminatorily written and discriminatorily applied."

Facts

The parties stipulated that certain employees, in the course of their employment, have access to the Internet. Included in employees with access are approximately 11 maintenance employees, four warehouse employees, and ten quality control employees. The parties further stipulated that other voting unit employees, though not authorized, could physically access computers with internet access. Some unidentified employees use Employer computers with Internet access to visit non-work related websites and send and receive non-work related e-mails during the critical period.

The Employer's internet policy[22] states that the internal mail systems and Internet access are available to employees to conduct Employer business. The Employer "recognizes that occasional and incidental personal use . . . may be made, provided that such use is not illegal nor interferes with the conduct of [Employer] business." The policy further states,

> D. The Internet, E-mail and voice mail are intended for the transmission of business-related transactions and should not be used for personal gain or advancement of individual views. Utilization of the Internet, E-mail, or voicemail to solicit for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations is prohibited.

Finally, the policy warns that employees have no expectation of privacy:

> Use by an employee . . . shall constitute expressed consent of the employee to monitoring and/or disclosure . . . of the contents of messages . . . . Such actions may include interception, review, retention, deletion, and recovery of all communications transmitted or received on the System."

Unlike the bulletin board policy, I find the Internet policy was not monitored by supervisors and managers. Rather, the only routine monitoring was performed by the company's information technologies (IT) department. From time to time IT notified supervisors or managers of employee abuse of the policy.[23] Thereafter, the particular employee was counseled. There is no evidence that any employee was disciplined, beyond counseling, for violation of the Internet policy. Supervisors and managers testified that they observed employees utilizing their company computers for Internet access to non-work-related sites during lunch and breaks and did not halt this incidental personal usage.

Similarly from the beginning of his employment in 2007 and continuing to date, warehouse material handler Warren observed employees access various Internet sites in order to exchange personal e-mail, perform online banking, search for items to purchase, and check sports sites. Warren specifically identified YouTube and Yahoo! websites and the Yahoo! search engine. Warren agreed that these activities sometimes occurred on non-break time. Similarly, unit employee Dan White testified that he observed one employee shopping online for an anniversary gift on several occasions.

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[22] Handbook at p. 40-42.

[23] According to production manager Nicola Maher, there have been 3 or 4 notifications from IT in the period from 2006 to 2008.

Warehouse material handler Warren testified that about April 25, supervisors Angie Pearce and Joe Mitchell told him that employees could not access information regarding Union activity on company computers. Warren testified that he continued to check his personal e-mail, usually while on break, and received e-mails from Union organizer Jesse Juarez while at work. He did not tell other employees about the conversation. Both Pearce and Mitchell denied that there was any discussion about computers in this or any other conversation with Warren. I find, contrary to their denials, that Warren was counseled about not using his company computer for Union business.

Arguments

The Employer asserts that its Internet policy is facially valid as written, citing *Register-Guard,* 351 NLRB No. 70 (2007). Further, the Employer argues that Petitioner has presented no credible evidence that the Internet policy was discriminatorily applied. The Employer argues that even if Warren's testimony regarding the admonition of supervisors Pearce and Mitchell is credited, this isolated, undisseminated, occurrence involving only one employee did not hinder employee free choice. Petitioner contends that the Employer's enforcement of its Internet policy was discriminatory within the meaning of *Register Guard, supra.*

Analysis

The Employer's Internet rule prohibits "non-job-related [e-]solicitation" in its entirety, whether an employee is on break, lunch, or working. Thus, the Employer's rule prohibits e-solicitation via the Employer's Internet during the employees' own time. Were the rule applicable to oral solicitation rather than e-solicitation, the rule would be overbroad. *Republic Aviation,* 324 U.S. 793, 803 fn. 10 (1945); *Peyton Packing Co.,* 49 NLRB 828, 843 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944), cert. denied 323 U.S. 730 (1944).[24] However, in *The Register Guard, supra,* a three-member majority of the Board held, based upon the fact that the Employer owned the computers and provided the Internet access, that employees had no statutory right to e-solicitation for Section 7 purposes. 351 NLRB No. 70, slip opinion at 7.

Thus, based upon the holding in *The Register Guard,* I find that the Employer's restriction on the use of its computers is facially valid. See also, *Champion International Corp.,* 303 NLRB 102, 109 (1991)(employer has a "basic right to regulate and restrict employee use of company property"); *Union Carbide Corp.,* 259 NLRB 974, 980 (1982), enfd. in part, 714 F.2d 657 (6th Cir. 1983)(there exists no statutory right of an employee to use an employer's telephone for personal or non-business purposes); *Heath Co.,* 196 NLRB 134 (1972)(employees are not entitled to use an employer's public address system to communicate their views). Further, I find that mere maintenance of this rule does not constitute objectionable conduct.

The Register Guard, supra, also instructs that although an employer may "lawfully bar employees' nonwork-related use of its e-mail system," if the employer acts in a manner that discriminates against Section 7 activity, it restrains and coerces employees. *Register Guard,*

[24] Thus, it has long been understood that non-working time belongs to the employee. See, e.g., *Essex International,* 211 NLRB 749 (1974)(rule which prohibited solicitation during working 'hours" overly broad because precludes solicitation during the employees' own time at lunch, break, and before and after work); *Avon Convalescent Center,* 200 NLRB 702 (1972), enfd. 490 F.2d 1384 (6th Cir. 1974)(rule prohibiting solicitation on company property invalid because it precluded employee solicitation on employees' own time during lunch, breaks, and before and after work); *Diamond Electric Manufacturing Corp.,* 346 NLRRB No. 83 (2006)(solicitation may not be prohibited on non-working time in working areas absent special circumstances).

351 NLRB No. 70, slip opinion at 7. Prior to the Board's *Register Guard* decision, disparate treatment of Section 7 solicitations was determined by comparison of any rules or practices regarding Section 7 communications to rules or practices regarding other non-work-related communications. *The Register Guard, supra,* dissent of Members Liebman and Walsh, slip opinion at 19. See, e.g., cases cited in the dissent: *Richmond Times-Dispatch,* 346 NLRB No. 11, slip opinion at 3 (2005), enfd. mem sub nom *Media General Operations, Inc. v. NLRB,* 225 Fed. Appx. 144 (4th Cir. 2007), cert. denied sub nom *Richmond Newspapers Professional Assn v. Media General Operations , Inc.,* 128 S.Ct. 492 (2007)(e-mail); *Vons Grocery Co.,* 320 NLRB 53, 55 (1995)(bulletin board); *Union Carbide Corp., supra,* 259 NLRB at 980 (telephone).

However, in *Register Guard,* the Board overruled prior Board law regarding discriminatory enforcement, stating that it was adopting the Seventh Circuit rationale set forth in *Fleming Co.,* 349 F.3d 968, 975 (2003)(company practice of permitting personal postings but not organizational postings, including union postings, did not constitute disparate treatment) and *Guardian Industries,* 49 F.3d 317, 321 (1995)(anti-discrimination principle inadequate to support finding that notices of union meetings unlawfully banned because "swap and shop" notices allowed). Thus, the Board held that "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status."[25]

In the instant case, there is one instance of a blanket prohibition of Section 7 e-solicitations made to unit employee Warren by supervisors Pearce and Mitchell. However, the record is devoid of evidence regarding any "organizational"[26] postings allowed by the Employer. In the absence of such evidence, no finding of disparate treatment, as enunciated in *The Register Guard,* may be found.

Objection 8—"The employer threatened and coerced employees."

Facts

In support of this objection, Petitioner presented the testimony of Linda Brown, a films department employee. She testified that within a month of the election, she was present during a conversation involving Jay Morales, production supervisor. Five to ten other employees were in the area.[27] Some of these employees and Morales had just completed a 6 a.m. "beginning-of-shift" meeting about work scheduled for that day. When the meeting was over, Brown and other employees were in the area of the "zapper" machine and the "filmer or AE machine."

During the ensuing conversation, Morales said, according to Brown, "some of you out there, if the election doesn't go through, some of you probably won't be working here." Brown responded by asking if that was a threat and Morales denied that it was. Brown then asked if Morales made the remark because she was wearing a pro-Union badge. Morales asked Brown

[25] Citations omitted.

[26] The Seventh Circuit utilized this term in analyzing discrimination in application of a bulletin board rule. *Fleming Companies, Inc. v. NLRB,* 349 F.3d 968, 975 (2003), noting that the company's actual practice of permitting personal postings, but not organizational ones, was consistently enforced. The court explained that once postings of a similar character to union materials are allowed, it would be discriminatory to prohibit union postings. Examples of such postings were provided by the administrative law judge in the underlying case: postings "expressing ideas and designed to induce action by employees as a group, such as an investment club, travel club, sports club, religious club, political club, or any similar club or committee."

[27] Brown could not recall the names of any of these employees. She testified that some of these employees had been in the shift meeting but others in the area were from the prior shift on their way out.

to come to the office to discuss the matter but she declined the offer. Brown recalled repeating the conversation to one other unit employee but she could not remember the employee's name. Later, a different unit employee, Will Morris, asked Ms. Brown about the conversation, explaining that he had heard it from a co-worker. There is no evidence that any of the five to ten employees who were in the area at the time of this statement were able to hear the interchange between Morales and Brown.

Former plant manager and since 2008 special projects manager Thomas Morey testified that he held formal and informal meetings regarding the Union on May 13. Linda Brown attended an informal meeting held by Morey on the topic of job security. Morey told employees that "the rules are the rules whether there's a union or not." Morey made similar comments to employees in one-on-one conversations.

Morales testified that he did not recall making a statement to Brown or to any other employee that, if the Union did not win, some employees probably would not be working for the Employer. Morales recalled job security remarks in Morey's presentation to employees. Following one such presentation, Morales spoke with employees Kevin Brock, Ruben Cabralas, and Mike Bracco, individually. Morales did not remember that Brown was in the area when he spoke to Cabralas or Bracco. However, he recalled that she was in the area when he spoke with Brock. This conversation took place outside his office in films near the "zapper" machine. Brock stated that he was worried about the Union. Specifically, Brock opined that if the Union won the election, it might only protect the pro-Union employees. Morales responded that whether there was a union or not, disciplinary action would take place as normal. Morales added that employees tended to fire themselves by showing up late, abusing sick time, or failing to follow up with their work.

Morales also recalled a conversation with employee Mike Grecco near the "zapper" machine during the critical period. This conversation was similar to the conversation with Brock. Grecco stated that he was concerned about the Union coming in and taking care of lazy employees. Morales responded, just as he had to Brock, that disciplinary action would take place as normal whether there was a union or not.

Human resources manager Branwyn Fearn testified that Linda Brown visited her in the HR office around May 15. Brown reported that she "thought" Jay Morales had said there were a number of employees that would not be with the Employer any longer if the Union did not win the election. Fearn asked for more details. Brown explained that she was with a group of employees when the statement was made and she thought Morales was making the statement directly to her because she was wearing a Union button. Fearn testified that both she and Brown agreed that emotions were high. According to Fearn, Brown agreed that Morales could have been saying that union or no union the company will still go on disciplining employees due to performance issues. I find that Fearn's testimony regarding what Brown "thought" Morales said is not directly helpful with regard to the actual statement Morales made. Accordingly, I accord no weight to Fearn's testimony on this matter.

I credit Brown's testimony that Morales made the statement, "some of you out there, if the election doesn't go through, some of you probably won't be working here." In making this credibility resolution, I note that Brown is a current employee and, thus, was testifying against the interest of her Employer. See, e.g., *Meyers Transport of New York,* 338 NLRB 958, 968 (2003), and cases cited therein (testimony of current employee against his employer is considered to be against employee's self-interest and therefore more worthy of belief). Further, I note that her testimony was consistent on direct and cross-examination and that her demeanor was straight forward and open. Finally, I note that Morales testified that he did not remember

making such a statement to Brown or any other employee. This is less than a categorical denial and I draw an adverse inference.[28]

Thus I conclude that supervisor Morales stated, "some of you, if the election doesn't go through, some of you probably won't be working here." There were about five to ten employees in the area but there is no evidence that any of them heard this statement other than Brown. Brown repeated the statement to one unnamed employee who repeated the statement to one other employee.

Analysis

The statement made by Morales constitutes a threat of job loss because of support for the Petitioner. See, e.g., *PPG Industries,* 351 NLRB No. 57, slip opinion at 5 (2007)(statement if the union got into the plant, employee probably would not have a job anymore is coercive), citing *Bestway Trucking,* 310 NLRB 651, 671 (1993), enfd. 22 F.3d 177 (7th Cir. 1994). Such a statement tends to interfere with employee free choice. I recommend that Objection 8 be sustained.

Objection 10: "The employer engaged in interrogation of employees."

Facts

Union advocate Will Morris testified he spoke with supervisor Sappington on April 7. Morris was wearing a Union button for the first time on this date. He told Sappington there had been a Union meeting and Sappington asked how many employees attended the meeting. Morris responded 45-50 employees.

Analysis

The statement was made on April 7. The petition was not filed until April 10. Moreover, this pre-petition conduct, assuming arguendo that it had a tendency to interfere with employee free choice, is not related to any post-petition conduct and will therefore not be considered further. See, e.g., *Dresser Industries,* 242 NLRB 74 (1979)(pre-petition conduct, although not a basis for setting aside an election, may nevertheless be considered when it adds meaning and dimension to related post-petition conduct.) I recommend that Objection 10 be overruled because the interrogation, even if coercive, did not occur within the critical period.

Objection 12: "The company asked employees to pass out anti-Union literature."

Facts

Craig Lloyd, who was working the graveyard shift, attended a beginning-of-shift meeting around 10 p.m. during the week of May 12. Films department supervisor Duane [last name unknown] gave films department employee Tony Yado a stack of 20-30 anti-Union flyers, instructing Tony to pass out the flyer to employees at the meeting. Yado took the stack, kept a flyer for himself, and passed the rest of the stack to Lloyd. Lloyd put the stack of fliers on a table. Duane told Lloyd he could not do that – to take a flyer and pass it on. The prior week at a

[28] An adverse inference is warranted where a witness does not deny, or only generally denies without further specificity, certain adverse testimony from an opposing witness, which the witness was in the best position to deny. *Ascaro, Inc.*, 316 NLRB 636, 640 fn. 1 (1995), enfd. 86 F.3d 1401 (5th Cir. 1996).

similar meeting, films department employee Daniel Hiraga was asked to pass out similar flyers. He handed each employee a copy of the flyer. Lloyd agreed, on cross-examination, that he regularly wore a Union button and a Union hat to work. He did not cease wearing these items after these incidents.

Unit employee Tony Ferreira testified that in early May, supervisor Jay Morales tried to give Ferreira some Employer election propaganda. Ferreira told Morales he did not want the material. Morales responded, "You're on my time. You have to take it." Ferreira answered, "Save a tree." Unit employee lead operator Kevin Brock walked by and said, "Take it." Ferreira took the literature and put it in the trash can immediately next to him in Morales' presence. Morales recalled the same incident. Morales testified that after Ferreira refused the document, Morales said, "here, just take it and you can do whatever you want with it but, I want to make sure that you receive this copy." Ferreira took the material and threw it in the garbage while Morales watched. Ferreira was not disciplined regarding this incident.

Analysis

The testimony in support of objection 12 involves employees who were asked to distribute Employer anti-Union literature (Yago, Lloyd, and Hiraga) as well as an employee who was required by a supervisor to accept an Employer distribution of anti-Union literature.

With regard to requiring employees to distribute anti-Union literature, I note that an employer may not compel an employee to express opposition to union representation. See, *Smithfield Packing Co.,* 344 NLRB 1, 3 (2004), enfd. 447 F.3d 821 (D.C. Cir. 2006)(requiring employee to stamp "Vote No" on kill floor animals), citing *Fieldcrest Cannon, Inc.,* 318 NLRB 470, 496 (1995), enfd. in relevant part 97 F.3d 65, 72, 74 (4th Cir. 1996)(directing employee to wear a "Vote No" T-shirt); *Florida Steel Corp.,* 224 NLRB 587, 588-589 (1976), enfd. mem. 552 F.2d 368 (5th Cir. 1977)(requiring employees to pose for photographs holding "vote no" signs). See also *Smithfield Packing, supra,* at 5 (requiring openly pro-union employee to distribute anti-union message to other department employees did not constitute solicitation of employee to abandon his support for union; unnecessary to decide whether such action in and of itself was unlawful because such a finding would be cumulative).

Similarly, in *Curtin Matheson Scientific,* 310 NLRB 1090 (1993), the employer required a pro-union employee who had lawfully distributed pro-union campaign literature to retrieve that literature in the presence of supervisors. The employee explained, to those who asked her, that the employer had ordered her to retrieve the literature. The Board held that such a requirement, made before fellow employees, "manifestly required [the employee] to repudiate [her] expression of pro-union sentiment or risk a charge of insubordination" and to single out employees who had accepted the pro-union literature. Thus, the Board found that this action reasonably tended to discourage employees in the exercise of their right to engage in protected activity. Based upon these authorities, I find that Petitioner required employees to express opposition to union representation by distributing anti-union literature. I recommend that Objection 12 be sustained as to the requirement that employees distribute anti-union literature.

Regarding the requirement that employee Ferreiro accept anti-union literature from his supervisor, I note that distribution by supervisors of displayable anti-union paraphernalia requires employees to make an observable choice indicating their acceptance or rejection of the union. Such distribution is violative of the Act. See, e.g., *Circuit City Stores,* 324 NLRB 147 (1994)("Vote No" coffee mugs); *Barton Nelson, Inc.,* 318 NLRB 712 (1995)(anti-union hats); *A. O. Smith Automotive Products Co.,* 315 NLRB 994 (1994)("Vote No" caps, T-shirts, and buttons). With regard to supervisory distribution of lawful anti-union literature and forcing

employees to accept this literature, however, the Board held in *Intermet Stevensville,* 350 NLRB No. 94, slip opinion at 7-8 (2007), that there was no interference with employee free choice. The Board reasoned that because the campaign literature therein was not for display, supervisory participation in distributing anti-union literature to employees and forcing employees to take such literature was distinguishable from supervisory distribution of displayable anti-union paraphernalia. Thus, I recommend that Objection 12 be dismissed regarding requiring an employee to accept anti-union literature from a supervisor.

Should the election be set aside?

In order to determine whether critical period misconduct requires that a new election be held, the Board employs an objective test – whether the party's misconduct has a tendency to interfere with employee free choice. See, e.g., *Lake Mary Health & Rehabilitation,* 345 NLRB 544, 545 (2005); *Cambridge Tool Mfg.,* 316 NLRB 716 (1995).

Critical period misconduct at issue in determining whether a new election should be held is as follows:

- A Handbook rule, distributed to many unit employees and available to all unit employees, which would reasonably be read to prohibit conversations with the Union regarding wages, hours and terms and conditions of employment;
- A Handbook rule, distributed to many unit employees and available to all unit employees, which would reasonably be read to prohibit solicitation or distribution of literature anywhere on Employer property;
- A threat of termination made within a month of the election to one unit employee and disseminated, at most, to two other unit employees;
- A request made to two employees within one to two weeks of the election within the presence of other graveyard shift employees to distribute employer anti-union literature to fellow employees.

In assessing whether misconduct has a tendency to interfere with an election, the Board examines the following factors:

> (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.

Taylor Wharton Harsco Corp., 336 NLRB 157, 158 (2001) enfd. 818 F.2d 1108 (4th Cir. 1987), citing *Avis Rent-a-Car,* 280 NLRB 580, 581 (1986).

Having carefully considered these factors with regard to the two unenforced Handbook rules, I find that a new election is not required. I note in particular that the confidentiality rule and the no solicitation/no distribution rule were never at issue during the campaign. Terms and conditions of employment were discussed throughout the campaign and solicitations and distributions were allowed on Employer property during breaks, lunch, and before and after work.

For example, in *Longs Drug Stores,* 347 NLRB No. 45 (2006), the handbook[29] stated that unauthorized disclosure of confidential information was subject to discipline including discharge. A rule directly following the general confidential information advisory stated, "Your pay is confidential and should not be discussed with fellow employees." Notwithstanding the above rule, in effect during the critical period, employees openly discussed wages and were not subject to disciplinary action. A chart listing job classifications and applicable wage rates was posted in the employee break room. The Board found the rule unlawful but a two-member majority held that it was "virtually impossible"[30] to conclude that the rule alone affected the outcome of the election.[31] The majority noted that employees openly discussed wages during the critical period, the break room chart set forth wages, the provisions of the handbook were never enforced, and the union lost the election by a wide margin.[32]

Similarly, in *Delta Brands, Inc.,* 344 NLRB 252 (2005), relied upon by the Employer, a rule prohibited vending, solicitation or collecting contributions for any purposes without management approval. The rule, contained in a 36-page policy manual, was not adopted in reaction to the union campaign. Only one employee was given the manual during the critical period although all employees received a copy of the manual. The rule was not enforced. The Board held that the mere maintenance of the overly broad provisions of the policy manual, standing alone, were insufficient to set aside the election.

Despite the above solicitation and distribution provisions, unit employees routinely distributed Union literature during breaks, lunch, and before and after work. Moreover, unspecified employees were told verbally by human resources manager Fearn and other managers or supervisors that they could distribute material during lunch, breaks, and before and after work. Fearn also testified that she told groups of employees that they could solicit one another in the parking lot, sidewalk, smoking cage, break room, the picnic area, and any other non-work area. Union advocates acted pursuant to these orally promulgated directions and distributed materials on breaks, at lunch, and before and after work.

Similarly, about two weeks after the election petition was filed, unit employee Warren was notified by warehouse supervisor Angie Pearce and shipping and receiving supervisor Joe Mitchell that employees could not talk about Union activities during working time but employees were free to talk during lunch and break either in a break room or outside in the parking lot. They also told Warren that he could distribute literature during break time or after work but not during working hours.

The parties stipulated that during the critical period the Union, by and through its agent Jesse Juarez, extensively communicated with the voting unit employees on an almost daily basis. These communications included, but were not limited to, (A) faxes to and from the voting unit employees; (B) e-mails to and from voting unit employees; (C) text messages to and from voting unit employees and (D) telephone conversations with voting unit employees. These

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[29] A newer handbook did not repeat these rules. However, the newer handbook had not taken effect during the critical period and had been distributed to only five of the approximately 300 unit employees.

[30] In *Clark Equipment Co.,* 278 NLRB 498, 505 (1986), the Board held that conduct which is so minimal or isolated that it is virtually impossible that it affected the election results may not be grounds for a new election even though the conduct was "*a fortiori"* objectionable pursuant to *Dal-Tex Optical Co.,* 137 NLRB 1782, 1786-1787 (1962)(conduct in violation of 8(a)(1) that occurs during the critical period is "*a fortiori,*" conduct which interferes with the exercise of free choice.)

[31] Slip op. at 2.

[32] Slip op. at 3-4.

extensive communications occurred during both the working and non-working time of voting unit employees. Through these communications, the Union directed its employee supporters to distribute campaign materials that were attached or otherwise contained in these communications. Thus, the Handbook objections are insufficient to warrant a new election.

Moreover, in combination with the threat and the forced distribution, there are still insufficient grounds for setting aside the election. I note that the threat of job loss was an isolated event and was not broadly disseminated.[33] In isolation, in a large bargaining unit, such an isolated threat, considered alone, is not necessarily a basis for overturning an election. See, e.g., *Werthan Packaging, Inc.*, 345 NLRB 343, 345 (2005); *Caron Int'l Inc.*, 246 NLRB 1120 (1979). Finally, the requirement that two employees distribute anti-union literature to employees on their shifts is not of the severity to warrant a new election.[34]

Representation elections are not to be lightly overturned. *Delta Brands, Inc., supra,* 344 NLRB No. 10, slip opinion at 1-2, citing *NLRB v. Hood Furniture Mfg. Co.,* 941 F.2d 325, 328 (5th Cir. 1991) as follows: "there is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." See also, *Safeway, Inc.,* 338 NLRB No. 63, slip opinion at 1 (2002). Based on the record as a whole, I find that there is insufficient evidence to warrant setting aside the election[35] and I recommend that the matter be remanded to the Regional Director for certification of the results.

Dated: Washington, D.C., August 8, 2008.

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Mary Miller Cracraft
Administrative Law Judge

[33] See, e.g., *Bon Appetit Management Co.,* 334 NLRB 1042, 1044 (2001) (low-level supervisor interrogated employee and threatened pay cut if employee did not vote against union was un-disseminated and isolated and did not affect election which union lost by a great margin); *Woodbridge Foam Fabricating, Inc.,* 329 NLRB 841, 843 (1999)(un-disseminated solicitation of grievances from a single employee did not warrant new election).

[34] Although a new election was ordered in *Curtin Matheson Scientific, Inc., supra,* 310 NLRB 1090 (1993), the objectionable conduct involved an employee who distributed pro-union literature prior to a captive audience employer meeting held away from the employer facility. When the employer discovered this distribution, it required the employee to cease distribution and to collect all literature already distributed, thus requiring her to repudiate her pro-union sentiment or risk a charge of insubordination. The entire bargaining unit witnessed the action and was required to return materials to her that they had willingly accepted. These facts are distinguishable from the facts in this case.

[35] Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, D.C. within 14 days from the date of issuance of this Report and Recommendations. Exceptions must be received by the Board in Washington, D.C. by August 22, 2008. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Report.

APPENDIX A
Employment Policy Handbook

Compensation

Non-union, Non-exempt Employees

Base Salary Package

Employees will be paid on a bi-weekly basis. Wages are determined by comparing the job with similar positions in local salary surveys, and by identifying the skills, experience, and competencies the employee brings to the position.

Merit Increases

Base pay in all Henkel companies is reviewed on a regular basis. Annual merit budgets are determined for each business unit and reflect broad market and specific Company needs within a country or region. Merit increases are influenced by several factors, the first of which is the yearly financial performance of Henkel and/or the strategic business unit.

Other factors that determine the amount of a merit increase:

Individual performance

Current salary in relation to the appropriate marketplace

Current salary in relation to peers in similar positions

Variable Pay

Henkel places a strong emphasis on variable pay that is tied to the achievement of Henkel and stakeholder objectives.

To help recognize each employee's contribution, Henkel offers a variety of incentive plans based upon an individual's position in Henkel. MC I – III members participate in a standardized annual incentive plan called the Target Dialogue. Target Dialogue (TD) is a process by which employees in MC I – III agree upon yearly objectives with their supervisor and then evaluate the actual performance against those objectives at year end. In addition to the individual objectives, portions of the TD payout are tied to Henkel global performance as well as local business performance.

Employees in the sales function may participate in incentive plans similar to the Target Dialogue which are primarily focused on sales and business objectives.

As managers grow in their career by assuming additional responsibilities, they can expect a higher portion of their total pay to be variable, based on their performance.

In keeping with Henkel's compensation philosophy, local businesses have implemented incentive and other reward programs to recognize and reward performance for achieving business and site goals. Employees who are eligible for local incentive plans will be notified by their manager or Human Resources department of their eligibility.

Employment Verification

Purpose

The purpose of this policy is to establish and define the policy and procedures regarding release of information regarding past or present employees requested by outside sources (e.g., prospective employers).

Policy

Henkel considers any information regarding either past or present employees as private and confidential. Only the Human Resources Department (Shared Services Organization) is authorized to release such information on behalf of Henkel. Except as required by law, they will confirm only job titles, dates of employment, and the employee's current/final compensation.

All inquiries should be referred to the Human Resources Department, in writing, at fax number 610-270-8102.

Managers and supervisors are not permitted to disclose any information regarding past or present employees. Managers, supervisors, and all employees should follow the procedure outlined below.

Procedure

A. All inquiries about past or present employees must be referred to the Human Resources Department.
B. Henkel will not commit regarding the potential for continued employment or on the re-hire status of any individual.
C. Responses for requests from financial institutions must be accompanied by written permission from the employee before Henkel will respond.

Privacy of Employee Records

Policy

Henkel protects the privacy of its employees by restricting employee data to that which is needed for business, legal, or contractual purposes; by limiting internal access to employee data to those with a need to know and by releasing information from the employee files to those outside Henkel only with the employee's written consent or to meet legal requirements, employment verification requests or contractual requirements. All records pertaining to the employment of an individual are considered confidential.

Employee files are the property of Henkel. Employees may have access to these records consistent with applicable law.

Procedures

A. The employee must request access to their own employee file in writing.
B. A pre-determined time to review the file will be arranged by Human Resources.
C. Employees may receive one copy of all documents within their employee file.
D. A representative from Human Resources will be present during the examination.

E. The employee may make notes concerning the contents of the file, but may not remove any materials.
F. Unauthorized removal of documents from the file will be considered theft and may be grounds for immediate discharge.

Corrective Action / Termination

Policy

It is each manager's responsibility to effectively manage employees' performance, including taking corrective action when an employee is not performing satisfactorily or displays behavior which does not meet Company standards. Managers will notify employees of performance deficiencies and of Henkel's requirements for performance improvement. If sufficient progress is not made to correct the problems, the individual may be terminated.

Procedures

A. The following steps are normally followed when addressing performance/conduct-related problems:

    1. The manager should establish and promote two-way communications which address the specific performance deficiencies with the employee. Any oral discussions should be documented by the manager.

    2. If, after discussions on performance/conduct, improvement has not been made, the manager should give written notice to the employee, identifying problem areas and deficiencies, the expected level of performance or goals to be achieved, a statement of any assistance which may be provided to the employee and a reasonable time frame for performance improvement. Three months is the customary amount of time for an employee to show satisfactorily [sic] improvement in their performance. The period may be shorter or longer depending on the circumstances.

B. If during this time period the employee does not demonstrate steps toward satisfactory performance improvement, the employee may be terminated immediately.

C. Recommendations to terminate an employee must be reviewed and approved by two levels of management and the Human Resources Department prior to final action being taken.

D. All corrective actions will be documented in the personnel file of the employee.

E. Corrective action may include counseling, warnings, letters of reprimand and discharge.

Listed below are examples of behavior or actions that may result in corrective action up to and including immediate termination.

1. Creating unsafe conditions, committing an unsafe act or violating a safety practice/procedure.
2. Entering Company property without proper authorization at any time other than authorized working hours.
3. Leaving work without authorization during scheduled work time.

4. Wasting time or loitering during working hours.
5. Excessive absenteeism or tardiness.
6. Deliberately hindering or limiting production or other work.
7. Productivity or job performance that does not meet company standards.
8. Sleeping while on duty.
9. Taking more time than is allowed for breaks.
10. Insubordination, willful or deliberate refusal to do assigned tasks.
11. Distribution or posting of material unrelated to Company's business or engaging in personal business activities during work hours without company permission.
12. Theft or unauthorized possession of Company property or property of other employees.
13. Possession, use, sale or being under the influence of alcohol or illegal drugs, or the abuse of legal drugs on or in company property.
14. Committing a civil, criminal or Federal crime while at work or when using company property.
15. Fighting, horseplay, threatening or harassing other employees.
16. Possession of weapons, firearms, and explosives on Company property. Henkel Corporation prohibits employees from carrying a concealed weapon in the course of their employment. This prohibition includes individuals (not just employees) from carrying weapons on its premises. Regardless of whether an employee or individual may have a license to carry a concealed weapon, it does not mean an employee or individual has the right or is allowed to possess such weapons on its premises.
17. Damage to Company property or the property of another employee.
18. Falsification of personnel or other Company records.
19. Deliberate disclosure of proprietary or confidential Company records.
20. Unlawful or improper conduct off Company premises which adversely affects the employee's relationship to their job, fellow employees, or Henkel's products, property, reputation or goodwill in the community.
21. Violation of any local, corporate or Henkel Company policy.
22. Other unacceptable employee actions or inappropriate behavior.

This list is intended to be representative of the types of activities that may result in corrective action. It is not exhaustive, and is not intended to be comprehensive and does not change the employment-at-will relationship between the employee and Henkel. Other factors may be considered in determining the severity of the corrective action to be administered.

Corrective Action

All employees are expected to meet Henkel's standards of work performance. Work performance encompasses many factors including attendance, punctuality, personal conduct, job proficiency and general compliance with Henkel's policies and procedures.

The primary purpose of any corrective action shall be to correct and change behavior versus punishment.

While fair enforcement of company policies requires some uniformity, in general the overriding principles when determining whether corrective action is appropriate shall be that each case should be judged on its own merits and that the corrective action taken in any individual instance shall not establish a precedent.

Complaint Resolution Policy

Purpose

Henkel's philosophy is to respect and protect each employee's right to be heard, and to foster good communication and harmonious working relationships among all of its employees. Henkel, therefore, initiates this policy and related procedures to provide a means by which employee complaints can be resolved in a prompt and fair manner.

An employee who exercises his or her rights by registering a complaint pursuant to this policy will not be subject to any form of retaliation.

Policy

A. If an employee believes that any working condition, policy, practice or action by Henkel or another employee is unsafe, unjust or inappropriate, he/she should address such a problem with his/her immediate supervisor. Henkel's experience suggests that most problems can be solved with frank, prompt and open discussion at this level.

B. If the answer or solution offered is not to the employee's satisfaction or if, due to the nature of the problem the employee does not feel comfortable discussing the problem with his/her immediate supervisor, the employee should discuss the matter with his/her Senior Management or the Human Resources Department.

C. If the matter is still not resolved to the employee's satisfaction, he/she should refer the matter to Senior Management within the Human Resources Department.

D. While Henkel hopes that employees will feel that they can come forward with information, employees have the opportunity to register complaints or concerns anonymously through the Compliance Line (XXX-XXX-XXXX).

E. Henkel also maintains other policies regarding complaint procedures with respect to sexual harassment and other forms of harassment, equal employment opportunity, and business conduct. Employees should consult these policies and complaint procedures where appropriate. If employees need copies of these policies, they may obtain them by contacting their Human Resources Department.

F. Henkel acknowledges that there may be instances where employee complaints may not be resolved to the employees' full satisfaction. If this occurs, Human Resources Management has the responsibility to communicate the final resolution to such employees, if appropriate.

Electronic System, Voice, and Internal Mail Policy

Purpose

Henkel provides electronic, voice and internal mail systems consisting of hardware, software, internet access, records, files, internal mail routing and distribution systems, and data, including messages, which are available to its employees and certain customers and suppliers for conducting Henkel business ("System"). Henkel also recognizes that occasional and incidental personal use of the System may be made, provided that such use is not illegal nor interferes

with the conduct of Henkel business. This Electronic System, Voice, and Internal Mail Policy ("Policy") is intended to establish general guidelines regarding the use of the System and use of cell phones for business while driving by all users.

Practices

A. Employees, customers and suppliers are authorized to use the System upon the understanding that they have no expectations of privacy and, by using the System, they give their consent for Henkel to take all actions necessary to enforce Henkel policies or otherwise protect Henkel's business interests. Use by an employee of the System shall constitute expressed consent of the employee to monitoring and/or disclosure by Henkel of the contents of messages. Henkel deems necessary to operate the System and Henkel's overall business in the manner it sees fit. Such actions may include interception, review, retention, deletion, and recovery of all communications transmitted or received on the System.

B. Employees, customers, and suppliers may not use the System in any illegal nor inappropriate manner. Examples of such illegal or inappropriate use might include but are not limited to the following: infringement of the copyright or intellectual property rights of third parties, distribution of defamatory, fraudulent or harassing statements, or distribution of sexual comments or images, or comments that might offend someone on the basis of his or her race, age, gender, sexual orientation, religious or political beliefs, national origin or disability, or representing personal opinions as those of Henkel, or solicitation for personal gain or profit.

    - Employees are responsible to immediately notify their supervisor if inappropriate materials are transmitted or received on their computer.

C. Nothing in this Policy shall require Henkel to post notice of it, electronically or otherwise, on or within the System, although Henkel may do so at its sole discretion.

D. The Internet, E-mail and voice mail are intended for the transmission of business-related transactions and should not be used for personal gain or advancement of individual views. Utilization of the Internet, E-mail, or voicemail to solicit for commercial ventures, religious or political causes, outside organizations, or other non-job related solicitations is prohibited.

E. To the extent, employees, customers and vendors have access to Henkel's System, it is to be used in a manner consistent with Henkel's standards of business conduct as defined in the Corporate Policies, Practices and Procedures. Henkel reserves the right to terminate a user's access to the System at any time.

F. Illegal acquisition, duplication or use of software is prohibited. Licensed software or related documentation may not be duplicated or used on Henkel premises unless Henkel is expressly authorized by agreement with the licenser. No Henkel software may be provided to third parties including clients, contractors, customers, and others without company approval.

G. To prevent computer viruses from being transmitted through Henkel's e-mail and internet system, there will be no unauthorized loading or downloading of software, including games. All software must be registered to Henkel.

H. Henkel reserves the right to disclose employee Internet records, E-mail messages or voice mail messages to law enforcement or governmental officials or to other third parties, without notification or permission from the employees.

I. Employees are advised not to use the System for highly confidential or sensitive business-related communications. Such communications should be made in person. The System shall not be used to "hack" into other systems or other people's logins, or "crack" passwords, or breach computer or network security measures or other similar activities which have the intent, purpose, or result of violating or invading a third party's computer, network, internet web site or intranet.

J. Employees are advised to use voice mail and E-mail as cautiously as they would use any more permanent communication medium such as a memorandum or letter. Internet records, E-mail messages and voice mail messages are to be treated like shared paper files, with the expectation that anything in them is available for review by authorized representatives of Henkel or third parties. Employees must realize, for example, that messages:

- may be saved and read by third parties, and
- may be retrieved even after "deletion."

K. Periodic audits of Henkel PCs for viruses and unauthorized software will be conducted to ensure that Henkel is in compliance with software licenses. All computer viruses and unauthorized software products located during such audits will be eliminated.

L. Log-on identifications and passwords may not be shared with anyone unless an authorized management official of Henkel provides such approval.

M. Unethical or inappropriate use of the System may expose Henkel or an employee to possible criminal or civil liability. Such conduct will not be tolerated and may be cause for loss of access or corrective action. Henkel may take corrective action against employees who violate this Policy. Anyone who violates this policy may lose their right to use the system and may have legal action taken against them.

N. To the extent Employees are on the System from a remote location and/or on the System using a non-Henkel computer, the Employee will be subject to this Policy and its limitations and restrictions as described herein. Generally, Henkel software cannot be loaded on an employee's personal computer if it also resides on a Henkel computer. Employees must have approval from the Information Technology department concerning usage of any software or computer-related hardware and electronics in an off-site setting.

O. In order to ensure that Henkel has a complete record of all software, hardware and electronics, all software, hardware and electronics acquired by Henkel must be purchased through and delivered to the Information Technology Department. Software, hardware and electronics may not be purchased through employee corporate or personal credit cards, petty cash, or travel and entertainment budgets.

Solicitation and Distribution of Literature

To avoid disruptions and possible discord among employees, Henkel prohibits employees from soliciting other employees or distributing literature concerning non-work-related causes or activities on Henkel property.

To avoid disruptions and possible discord among employees, Henkel prohibits employees from soliciting other employees during the working time of either employees wishing to solicit or the working time of employees being solicited.

Similarly, Henkel prohibits employees from distributing literature during employee's working time and strictly prohibits distribution of literature by employees in work areas at all times.

Types of Solicitation Prohibited

Types of solicitation that are prohibited during working time include, but are not limited to: asking for funds or donations; offering goods for sale for a non-charitable or commercial purpose; buying or selling chances; buying or selling merchandise; circulating petitions; selling tickets or subscriptions; soliciting contributions or memberships; and any solicitation that disturbs or interferes with Henkel's business.

Types of Distribution Prohibited

Types of prohibited distribution in work areas and/or during working time include any non-work-related written or printed or electronic matter, and especially distributions that interfere with Henkel's business.

Harassment and Discrimination Also Prohibited

Soliciting or distributing literature that is harassing, discriminatory, hateful, obscene, defamatory or abusive is strictly prohibited at any time.

Non-Employee Solicitation or Distribution

Non-employees are strictly prohibited from soliciting and distributing literature at all times anywhere on Henkel property, including parking lots. Non-employees have no right of access to the non-working areas of Henkel's facility, but only to the public areas of Henkel's property in connection with its public use.

Charitable Efforts

As a sole exception, this policy does not restrict occasional activities connected with supporting charities such as asking for funds or donations or posting of non-profit charitable events, provided that any such activity must be approved by local Human Resource department prior to such activity.

Corrective Action

Employees who violate this policy may be subject to corrective action.